

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AMY LEDESMA, ) No. EDCV 08-1135-RC  
 )  
Plaintiff, )  
 ) OPINION AND ORDER  
v. )  
 )  
MICHAEL J. ASTRUE, )  
Commissioner of Social Security, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Plaintiff Amy Ledesma filed a complaint on September 3, 2008, seeking review of the Commissioner's decision denying her application for disability benefits. On February 17, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on April 15, 2009.

**BACKGROUND**

**I**

On August 25, 2006 (protective filing date), plaintiff applied for disability benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. § 423, and the Supplemental Security Income program

1 of Title XVI of the Act, 42 U.S.C. § 1382(a), claiming an inability to  
2 work since March 3, 2006, due to bipolar disorder. Certified  
3 Administrative Record ("A.R.") 8, 90. The plaintiff's application was  
4 initially denied on February 20, 2007, and, following reconsideration,  
5 was denied again on August 20, 2007. A.R. 8. The plaintiff then  
6 requested an administrative hearing, which was held on March 6, 2008,  
7 before Administrative Law Judge Mason D. Harrell, Jr. ("the ALJ").  
8 A.R. 16-44. On April 4, 2008, the ALJ issued a decision finding  
9 plaintiff is not disabled. A.R. 6-15. The plaintiff appealed this  
10 decision to the Appeals Council, which denied review on July 3, 2008.  
11 A.R. 1-3.

## 12 13 II

14 The plaintiff, who was born on July 22, 1968, is currently 41  
15 years old. A.R. 14, 99, 122. She has a 12th-grade education with one  
16 year of business college, and previously worked as a receptionist and  
17 as a waitress. A.R. 26, 91, 93, 120.

18  
19 Plaintiff was treated at the Riverside County Department of  
20 Mental Health ("RCDMH") from February 1, 2006, to February 13, 2008.  
21 A.R. 150-208, 233-38. Her primary treating physician was Bruce  
22 Bogost, M.D.,<sup>1</sup> A.R. 150-51, 154, 178, 182, 185, 188, 196, 203, 206-07,

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23  
24 <sup>1</sup> Dr. Bogost was a treating physician, although plaintiff  
25 refers to him as a "consultative examiner." Jt. Stip. at 12:12-  
26 13. See, e.g., Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir.  
27 2008) (physician who saw claimant five times in three years for  
28 treatment was treating physician); Ghokassian v. Shalala, 41 F.3d  
1300, 1303 (9th Cir. 1994) (physician who saw claimant twice  
within 14 months and prescribed medication was treating  
physician).

1 who diagnosed plaintiff as having bipolar II disorder and  
2 polysubstance dependence. See A.R. 150-51, 182, 196. Dr. Bogost and  
3 others prescribed several medications to plaintiff, including Zoloft,<sup>2</sup>  
4 Depakote,<sup>3</sup> and Seroquel.<sup>4</sup> A.R. 150-51, 153, 178, 203, 206, 236. On  
5 September 28, 2006, Dr. Bogost opined plaintiff: was paranoid and  
6 suffered from delusions; had a "mild" impairment of her memory and  
7 judgment; showed evidence of insomnia, depression and anxiety; was  
8 unable to maintain a sustained level of concentration, perform  
9 repetitive tasks for an extended period, or adapt to new or stressful  
10 situations; could not interact appropriately with strangers, co-  
11 workers or supervisors; was fearful and anxious; and needed assistance  
12 in keeping appointments. A.R. 151. Dr. Bogost further opined  
13 plaintiff could not complete a 40-hour work week without decompensat-  
14 ing, and her prognosis was guarded. Id.

15  
16 On September 4, 2006, Eugene Hu, M.D., an attending physician at  
17 Riverside County Regional Medical Center, noted plaintiff appeared to  
18 be using cocaine, amphetamine and heroin, and cleared plaintiff for  
19 entry into a "detox" program. A.R. 122-23. J. Robinson, L.V.N.,

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20  
21 <sup>2</sup> Zoloft, also called Sertraline, "is prescribed for major  
22 depression – a persistently low mood that interferes with  
23 everyday living." The PDR Family Guide to Prescription Drugs at  
612, 763 (8th ed. 2000).

24 <sup>3</sup> Among other uses, "Depakote . . . [is] used to control  
25 the manic episodes – periods of abnormally high spirits and  
26 energy – that occur in bipolar disorder (manic depression)." Id.  
at 194.

27 <sup>4</sup> "Seroquel combats the symptoms of schizophrenia, a mental  
28 disorder marked by delusions, hallucinations, disrupted thinking,  
and loss of contact with reality." Id. at 610.

1 noted plaintiff was on Methadone, was "shaky," and admitted using  
2 heroin the day before and showed "numerous scarred tract & prior  
3 abscess looking sites on [her] body." A.R. 124, 126.

4  
5 On February 10, 2007, psychiatrist Romualdo R. Rodriguez, M.D.,  
6 examined plaintiff, A.R. 127-35, and noted she was not under the  
7 influence of drugs at the time. A.R. 130. Dr. Rodriguez found  
8 plaintiff: had "coherent and organized" thought processes and was not  
9 delusional; had "no current suicidal, homicidal or paranoid ideation";  
10 described "her mood as euthymic"; was "polite, serious and relaxed"  
11 and not "tearful"; although feeling "helplessness and hopelessness at  
12 times, [plaintiff does] not [feel] worthless and guilty"; was "alert  
13 and oriented . . . [and] appears to be of at least average  
14 intelligence"; "could recall three items immediately and two items  
15 after five minutes"; "could perform serial threes [and] . . . can  
16 correctly and quickly complete simple mathematic problems"; and "was  
17 able to follow . . . conversation well." A.R. 130-31. Nevertheless,  
18 Dr. Rodriguez found plaintiff's "[i]nsight into her problems is very  
19 problematic," and determined plaintiff was "still actively using drugs  
20 illegally and not getting proper care for her mental health issues."  
21 A.R. 132. Dr. Rodriguez diagnosed plaintiff with: post-traumatic  
22 stress disorder, attention deficit hyperactivity disorder (ADHD) and  
23 polysubstance dependence, and he determined her Global Assessment of  
24 Functioning (GAF) was 60.<sup>5</sup> Id. Dr. Rodriguez opined that, "if

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25  
26 <sup>5</sup> A GAF of 60 indicates "[m]oderate symptoms (e.g., flat  
27 affect and circumstantial speech, occasional panic attacks) or  
28 moderate difficulty in social, occupational, or school  
functioning (e.g., few friends, conflicts with peers or  
coworkers)." American Psychiatric Association, Diagnostic and

1 [plaintiff] stopped all illegal drugs and [was] properly treated for  
2 ADHD and/or any other mood disorders she may have, she could easily  
3 recover from her problems within twelve months." A.R. 133. Dr.  
4 Rodriguez found plaintiff was: (1) "[a]ble to understand, remember  
5 and carry out simple one or two step job instructions"; (2) "[a]ble to  
6 do detailed and complex instructions"; (3) "[s]lightly limited in her  
7 ability to relate and interact with supervisors, coworkers and the  
8 public"; (4) "[m]oderately limited in her ability to maintain  
9 concentration and attention, persistence and pace"; (5) "[s]lightly  
10 limited in her ability to associate with day-to-day work activity,  
11 including attendance and safety"; (6) "[s]lightly limited in her  
12 ability to adapt to the stresses common to a normal work environment";  
13 (7) "[s]lightly limited in her ability to maintain regular attendance  
14 in the work place and perform work activities on a consistent basis";  
15 and (8) "[s]lightly limited in her ability to perform work activities  
16 without special or additional supervision." A.R. 133-34.

17  
18 On February 15, 2007, nonexamining psychiatrist Barbara A. Smith,  
19 M.D., opined plaintiff suffers from an affective disorder and a  
20 polysubstance dependence, and determined plaintiff's impairments were  
21 not severe. A.R. 136-46. Dr. Smith opined plaintiff has: (1) "mild"  
22 restriction of activities of daily living; (2) "marked" difficulties  
23 in maintaining social functioning; (3) "marked" difficulties in  
24 maintaining concentration, persistence or pace; and (4) three episodes  
25 of decompensation, each of extended duration. A.R. 144. Dr. Smith  
26 found plaintiff's drug abuse and alcoholism were material and without

27 \_\_\_\_\_  
28 Statistical Manual of Mental Disorders, 34 (4th ed. (Text  
Revision) 2000).

1 those conditions, plaintiff's "impairment [would] not [be] severe[,]"  
2 and plaintiff would have no restriction in activities of daily living,  
3 no difficulties in maintaining social functioning, "mild" difficulties  
4 in maintaining concentration, persistence or pace, and no episodes of  
5 decompensation. A.R. 144, 146.

6  
7 On May 3, 2007, Dr. Bogost, who had not seen plaintiff since  
8 December 7, 2006, opined plaintiff: showed no signs of psychosis and  
9 her memory was intact; had mildly impaired judgment; showed evidence  
10 of confusion, depression and anxiety and showed negative symptoms for  
11 apathy; could maintain a sustained level of concentration, but could  
12 not adapt to new or stressful situations; could not interact  
13 appropriately with family, strangers, co-workers or supervisors; was  
14 hostile, fearful and anxious; and needed assistance in keeping  
15 appointments. A.R. 150. Dr. Bogost again opined plaintiff could not  
16 complete a 40-hour work week without decompensating, and that her  
17 prognosis was guarded. Id.

18  
19 On February 13, 2008, an unidentified physician at RCDMH  
20 diagnosed plaintiff as having an unspecified mood disorder and heroin  
21 and methamphetamine dependence. A.R. 238. He/she opined that  
22 plaintiff: showed evidence of insomnia, depression, anxiety and  
23 compulsive behaviors, as well as impaired judgment and concrete  
24 thought patterns; showed no ability to maintain a sustained level of  
25 concentration, sustain repetitive tasks for an extended period, or  
26 adapt to new or stressful situations; showed no ability to interact  
27 appropriately with family, strangers, co-workers or supervisors;  
28 needed assistance with hygiene, and was unable to manage funds in her

1 best interest; "missed her appointments and has refused to go for lab  
2 work," and her prognosis was "chronic." Id.

3  
4 Medical expert Joseph M. Malancharuvil, Ph.D., testified at the  
5 administrative hearing that plaintiff has a mixed substance abuse  
6 disorder, an organic affective disorder with bipolar features  
7 secondary to substance abuse, and a personality disorder, not  
8 otherwise specified. A.R. 26-36. Dr. Malancharuvil opined that her  
9 mental limitations would be "marked" if she's intoxicated, but, if not  
10 abusing drugs, she would have only a "mild" limitation in her  
11 activities of daily living, "mild" difficulty maintaining social  
12 functioning, "mild-to-moderate" difficulties maintaining  
13 concentration, persistence or pace, and no episodes of decompensation.  
14 A.R. 28-29. Dr. Malancharuvil further opined plaintiff is restricted  
15 to simple work, up to four to five-step instructions with no excessive  
16 speed requirements, and she should not be involved in safety  
17 operations or operate hazardous machinery. A.R. 29-31.

## 18 19 DISCUSSION

### 20 III

21 This Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
22 review the Commissioner's decision denying plaintiff disability  
23 benefits to determine if his findings are supported by substantial  
24 evidence and whether the Commissioner used the proper legal standards  
25 in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th  
26 Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).  
27 "In determining whether the Commissioner's findings are supported by  
28 substantial evidence, [this Court] must review the administrative

1 record as a whole, weighing both the evidence that supports and the  
2 evidence that detracts from the Commissioner's conclusion." Reddick  
3 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Lingenfelter v. Astrue,  
4 504 F.3d 1028, 1035 (9th Cir. 2007); Holohan v. Massanari, 246 F.3d  
5 1195, 1201 (9th Cir. 2001). "Where the evidence can reasonably  
6 support either affirming or reversing the decision, [this Court] may  
7 not substitute [its] judgment for that of the Commissioner." Ryan v.  
8 Comm'r of Soc. Sec., 528 F.3d 1194, 1205 (9th Cir. 2008) (quoting  
9 Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007), cert. denied, 128  
10 S. Ct. 1068 (2008)); Vasquez, 572 F.3d at 591.

11  
12 The claimant is "disabled" for the purpose of receiving benefits  
13 under the Act if she is unable to engage in any substantial gainful  
14 activity due to an impairment which has lasted, or is expected to  
15 last, for a continuous period of at least twelve months. 42 U.S.C.  
16 §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505(a), 416.905(a).  
17 "The claimant bears the burden of establishing a prima facie case of  
18 disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995),  
19 cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80 F.3d 1273,  
20 1289 (9th Cir. 1996); see also Valentine v. Comm'r Soc. Sec. Admin.,  
21 574 F.3d 685, 689 (9th Cir. 2009) ("To establish eligibility for  
22 Social Security benefits, a claimant has the burden to prove he is  
23 disabled.").

24  
25 The Commissioner has promulgated regulations establishing a  
26 five-step sequential evaluation process for the ALJ to follow in a  
27 disability case. 20 C.F.R. §§ 404.1520, 416.920. In the **First Step**,  
28 the ALJ must determine whether the claimant is currently engaged in



substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).  
 If not, in the **Second Step**, the ALJ must determine whether the  
 claimant has a severe impairment or combination of impairments  
 significantly limiting her from performing basic work activities. 20  
 C.F.R. §§ 404.1520(c), 416.920(c). If so, in the **Third Step**, the ALJ  
 must determine whether the claimant has an impairment or combination  
 of impairments that meets or equals the requirements of the Listing of  
 Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20  
 C.F.R. §§ 404.1520(d), 416.920(d). If not, in the **Fourth Step**, the  
 ALJ must determine whether the claimant has sufficient residual  
 functional capacity despite the impairment or various limitations to  
 perform her past work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If not,  
 in **Step Five**, the burden shifts to the Commissioner to show the  
 claimant can perform other work that exists in significant numbers in  
 the national economy. 20 C.F.R. §§ 404.1520(g), 416.920(g).  
 Moreover, where there is evidence of a mental impairment that may  
 prevent a claimant from working, the Commissioner has supplemented the  
 five-step sequential evaluation process with additional regulations  
 addressing mental impairments.<sup>6</sup> Maier v. Comm'r of the Soc. Sec.

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<sup>6</sup> First, the ALJ must determine the presence or absence of  
 certain medical findings relevant to the ability to work. 20  
 C.F.R. §§ 404.1520a(b)(1), 416.920a(b)(1). Second, when the  
 claimant establishes these medical findings, the ALJ must rate  
 the degree of functional loss resulting from the impairment by  
 considering four areas of function: (a) activities of daily  
 living; (b) social functioning; (c) concentration, persistence,  
 or pace; and (d) episodes of decompensation. 20 C.F.R. §§  
 404.1520a(c)(2-4), 416.920a(c)(2-4). Third, after rating the  
 degree of loss, the ALJ must determine whether the claimant has a  
 severe mental impairment. 20 C.F.R. §§ 404.1520a(d),  
 416.920a(d). Fourth, when a mental impairment is found to be  
 severe, the ALJ must determine if it meets or equals a Listing.  
 20 C.F.R. §§ 404.1520a(d)(2), 416.920a(d)(2). Finally, if a

1 Admin., 154 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).

2  
3 However, "[a] finding of 'disabled' under the five-step inquiry  
4 does not automatically qualify a claimant for disability benefits."  
5 Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001); Parra, 481  
6 F.3d at 746. Rather, the Act provides that "[a]n individual shall not  
7 be considered disabled . . . if alcoholism or drug addiction would  
8 . . . be a contributing factor material to the Commissioner's  
9 determination that the individual is disabled." 42 U.S.C. §  
10 423(d)(2)(C).

11  
12 For claimants such as plaintiff, who have substance abuse  
13 dependency, the ALJ "must first conduct the five-step inquiry without  
14 separating out the impact of alcoholism or drug addiction. If the ALJ  
15 finds that the claimant is not disabled under the five-step inquiry,  
16 then the claimant is not entitled to benefits and there is no need to  
17 proceed with the analysis under 20 C.F.R. §§ 404.1535 or 416.935."  
18 Bustamante, 262 F.3d at 955 (citations omitted); see also Brueggemann  
19 v. Barnhart, 348 F.3d 689, 694 (8th Cir. 2003) ("The plain text of the  
20 relevant regulation requires the ALJ first to determine whether [the  
21 claimant] is disabled . . . without segregating out any effects that  
22 might be due to substance use disorders. . . ." (citations and  
23 footnote omitted)); Drapeau v. Massanari, 255 F.3d 1211, 1214 (10th

24  
25 Listing is not met, the ALJ must then perform a residual  
26 functional capacity assessment, and the ALJ's decision "must  
27 incorporate the pertinent findings and conclusions" regarding  
28 plaintiff's mental impairment, including "a specific finding as  
to the degree of limitation in each of the functional areas  
described in [§§ 404.1520a(c)(3), 416.920a(c)(3)]." 20 C.F.R. §§  
404.1520a(d)(3), (e)(2), 416.920a(d)(3), (e)(2).

1 Cir. 2001) ("The implementing regulations make clear that a finding of  
 2 disability is a condition precedent to an application of §  
 3 423(d)(2)(C). The [ALJ] must first make a determination that the  
 4 claimant is disabled." (citation omitted)). Then the ALJ "must  
 5 determine whether [the claimant's] drug addiction or alcoholism is a  
 6 contributing factor material to the determination of disability."<sup>7</sup> 20  
 7 C.F.R. §§ 404.1535(a), 416.935(a); see also Brueggemann, 348 F.3d at  
 8 694-95 ("If the gross total of a claimant's limitations, including the  
 9 effect of substance use disorders, suffices to show disability, then  
 10 the ALJ must next consider which limitations would remain when the  
 11 effects of the substance use disorders are absent."); Drapeau, 255  
 12 F.3d at 1214 ("[The ALJ] must then make a determination whether the  
 13 claimant would still be found disabled if he or she stopped abusing  
 14 alcohol [or drugs].").

15  
 16 Applying the sequential evaluation process, the ALJ found  
 17 plaintiff has not engaged in substantial gainful activity since the  
 18 alleged onset of disability. (Step One). The ALJ then found  
 19 plaintiff has the following "severe combinations of impairments:  
 20 mixed substance addiction disorder, substance induced organic  
 21 affective disorder with bipolar features, generalized anxiety  
 22 disorder, and personality disorder, not otherwise specified"; however,  
 23 plaintiff does not have a severe physical impairment. (Step Two).

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24  
 25 <sup>7</sup> "The 'key factor . . . in determining whether drug  
 26 addiction or alcoholism is a contributing factor material to the  
 27 determination of disability' is whether an individual would still  
 28 be found disabled if [he] stopped using alcohol or drugs." Sousa  
v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998) (citation  
 omitted); 20 C.F.R. §§ 404.1535(b)(1), 416.935(b)(1).

1 The ALJ then found plaintiff's "impairments, including the substance  
 2 use disorders," meet the requirements of Listing nos. 12.02, 12.06,  
 3 12.08 and 12.09. (Step Three). Having concluded plaintiff is  
 4 disabled when her substance abuse is considered, the ALJ next  
 5 addressed whether plaintiff's substance abuse is a contributing factor  
 6 material to the disability determination. The ALJ found that if  
 7 plaintiff stopped her substance abuse, she would continue to have a  
 8 severe impairment or combination of impairments (Step Two); however,  
 9 she would not have an impairment or combination of impairments that  
 10 meets or equals a listed impairment. (Step Three). The ALJ then  
 11 concluded that even if plaintiff stopped her substance abuse, she  
 12 would be unable to perform her past relevant work. (Step Four).  
 13 Finally, the ALJ determined that if plaintiff stopped her substance  
 14 abuse, there are a significant number of jobs in the national economy  
 15 she can perform; therefore, she is not disabled. (Step Five).

#### 17 IV

18 A claimant's residual functional capacity ("RFC") is what she can  
 19 still do despite her physical, mental, nonexertional, and other  
 20 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001);  
 21 see also Valentine, 574 F.3d at 689 (The RFC is "a summary of what the  
 22 claimant is capable of doing (for example, how much weight he can  
 23 lift)."). Here, the ALJ found that if plaintiff "stopped the  
 24 substance use," she would retain the following RFC:

25  
 26 to perform light work<sup>8</sup> . . . except work involving more than

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27  
 28 <sup>8</sup> "Light work involves lifting no more than 20 pounds at a  
 time with frequent lifting or carrying of objects weighing up to

1 simple tasks, i.e., more than four to five steps of instructions,  
 2 any rapid, assembly-line-type work, any significant  
 3 responsibility for the safety of others, or any significant  
 4 hypervigilance.

5  
 6 A.R. 12 (footnote added). However, plaintiff contends the RFC finding  
 7 is not supported by substantial evidence because: (1) the ALJ failed  
 8 to properly consider the opinions of treating physician Dr. Bogost and  
 9 consulting physician Dr. Rodriguez; (2) erroneously concluded  
 10 plaintiff is not a credible witness; and (3) failed to fully and  
 11 fairly develop the record. There is no merit to these contentions.  
 12

13 **A. Physicians' Opinion Evidence:**

14 The medical opinions of treating physicians are entitled to  
 15 special weight because the treating physician "is employed to cure and  
 16 has a greater opportunity to know and observe the patient as an  
 17 individual." Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987);  
 18 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.  
 19 1999). Therefore, the ALJ must provide clear and convincing reasons  
 20 for rejecting the uncontroverted opinions of a treating physician,  
 21 Ryan, 528 F.3d at 1198, and "[e]ven if [a] treating doctor's opinion  
 22 is contradicted by another doctor, the ALJ may not reject this opinion  
 23 without providing 'specific and legitimate reasons' supported by  
 24 \_\_\_\_\_

25 10 pounds. Even though the weight lifted may be very little, a  
 26 job is in this category when it requires a good deal of walking  
 27 or standing, or when it involves sitting most of the time with  
 28 some pushing and pulling of arm or leg controls. To be  
 considered capable of performing a full or wide range of light  
 work, you must have the ability to do substantially all of these  
 activities." 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 substantial evidence in the record." Reddick, 157 F.3d at 725;  
2 Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). Similarly,  
3 the ALJ "must provide 'clear and convincing' reasons for rejecting the  
4 uncontradicted opinion of an examining physician[,]" Lester v. Chater,  
5 81 F.3d 821, 830 (9th Cir. 1995); Widmark v. Barnhart, 454 F.3d 1063,  
6 1066 (9th Cir. 2006), and "[e]ven if contradicted by another doctor,  
7 the opinion of an examining doctor can be rejected only for specific  
8 and legitimate reasons that are supported by substantial evidence in  
9 the record." Regennitter v. Comm'r of the Soc. Sec. Admin., 166 F.3d  
10 1294, 1298-99 (9th Cir. 1999); Ryan, 528 F.3d at 1198.

11  
12 **B. Dr. Bogost:**

13 Dr. Bogost diagnosed plaintiff with bipolar II disorder and  
14 polysubstance dependence and made various findings regarding  
15 plaintiff's mental condition in two written reports dated  
16 September 28, 2006, and May 3, 2007. The plaintiff contends the ALJ  
17 improperly rejected Dr. Bogost's opinion in concluding plaintiff would  
18 not be disabled if she stopped her substance abuse. The plaintiff is  
19 mistaken.

20  
21 Dr. Bogost found plaintiff could not work given her bipolar  
22 disorder and polysubstance abuse. A.R. 150-51. The ALJ agreed with  
23 this conclusion, finding plaintiff is disabled when she is abusing  
24 drugs. A.R. 11. However, as the ALJ noted, Dr. Bogost did not  
25 consider, or have any opinion about, what mental limitations plaintiff  
26 would have if she stopped abusing drugs,<sup>9</sup> stating:

27 \_\_\_\_\_  
28 <sup>9</sup> The record indicates plaintiff was abusing drugs  
throughout her treatment at RCDMH. See, e.g., A.R. 158, 163,

1 The fact that [Dr. Bogost] . . . has indicated the  
2 [plaintiff] cannot perform any work because of a combination  
3 of affective, substance dependence, and personality  
4 disorders is not material at this point in the sequential  
5 evaluation process since it does not address the issue of  
6 whether the [plaintiff] would still be disabled if she were  
7 not actively abusing drugs and further inquiry would yield  
8 no significant findings since the treating source has  
9 indicated that the [plaintiff's] limitations are mild in  
10 terms of memory and judgment when sober, that she has no  
11 problems in terms of social withdrawal, and that she is  
12 simply apathetic[,] which is consistent with the findings of  
13 polysubstance dependence. This is also consistent with [Dr.  
14 Rodriguez's] findings . . . and fully consistent with the  
15 medical expert's findings at the hearing regarding the  
16 severity of the [plaintiff's] mental impairment if she were  
17 to stop abusing drugs.

18  
19 A.R. 13. In other words, contrary to plaintiff's contention, the ALJ  
20 did not ignore Dr. Bogost's opinion. Rather, the ALJ agreed with Dr.  
21 Bogost's opinion to the extent it addressed plaintiff's ability to  
22 work while she continued to abuse drugs, see Valentine, 574 F.3d at  
23 691-92 (no error when ALJ considered physician's evidence claimant  
24 contends ALJ ignored), and only "rejected" Dr. Bogost's opinion to the  
25 extent it failed to consider the pertinent issue before the ALJ -  
26 whether plaintiff would remain disabled if she stopped abusing drugs.

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27  
28 175, 181, 201.

1 A.R. 13. To address that question, the ALJ relied on the two  
2 physicians who considered the issue - examining physician Dr.  
3 Rodriguez and medical expert Dr. Malancharuvil - and these physicians'  
4 findings constitute substantial evidence to support the ALJ's RFC  
5 assessment. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
6 2001) (examining physician's medical report based on independent  
7 examination of claimant constitutes substantial evidence to support  
8 ALJ's disability determination); Saelee v. Chater, 94 F.3d 520, 522  
9 (9th Cir. 1996) ("[T]he findings of a nontreating, nonexamining  
10 physician can amount to substantial evidence, so long as other  
11 evidence in the record supports those findings."), cert. denied, 519  
12 U.S. 1113 (1997). Thus, the ALJ did not err, and there is no merit to  
13 plaintiff's claim. Valentine, 574 F.3d at 691-92.

14  
15 **C. Dr. Rodriguez:**

16 On February 10, 2007, when Dr. Rodriguez conducted a complete  
17 psychiatric examination of plaintiff, she was sober and not under the  
18 influence of drugs; however, Dr. Rodriguez determined plaintiff "is  
19 still actively using drugs illegally. . . ." A.R. 130. Based on his  
20 examination, Dr. Rodriguez determined plaintiff was: able to  
21 "understand, remember and carry out simple one or two-step  
22 instructions"; able "to do detailed and complex instructions";  
23 "[s]lightly limited" in her abilities to relate and interact with  
24 supervisors, coworkers and the public, to associate with day-to-day  
25 work activity, to adapt to the stresses common to a normal work  
26 environment, to maintain regular attendance in the work place and  
27 perform work activities on a consistent basis, and to perform work  
28 activities without special or additional supervision; and



1 "[m]oderately limited in her ability to maintain concentration and  
2 attention, persistence and pace." A.R. 133-34. Dr. Rodriguez also  
3 opined that if plaintiff "stopped using all illegal drugs and [was]  
4 properly treated . . . , she could easily recover from her problems  
5 within twelve months." A.R. 133.

6  
7 The plaintiff contends that the ALJ failed to consider Dr.  
8 Rodriguez's opinion that plaintiff is "moderately" limited in her  
9 ability to "maintain concentration and attention, persistence and  
10 pace[,] and, thus, failed to provide a "legally sufficient reason"  
11 for rejecting this finding. Jt. Stip. at 3:6-4:11. The plaintiff is  
12 mistaken. The ALJ did not "reject" any of Dr. Rodriguez's findings  
13 and, in fact, adopted Dr. Rodriguez's findings, specifically holding  
14 that "[w]ith regard to maintaining concentration, persistence or pace,  
15 the [plaintiff] would have marginally moderate difficulties if the  
16 substance use was stopped."<sup>10</sup> A.R. 12. Thus, the ALJ did not err,  
17 and there is no merit to plaintiff's claim. Valentine, 574 F.3d at  
18 691-92.

19 //

20 //

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21  
22 <sup>10</sup> Moreover, although Dr. Rodriguez opined plaintiff is  
23 "moderately" limited in her ability to maintain concentration,  
24 persistence and pace, he also found plaintiff's difficulties in  
25 this regard do not prevent her from being able to perform even  
26 detailed and complex instructions. A.R. 133. The ALJ's RFC  
27 assessment, which limited plaintiff to light "work involving  
28 . . . simple tasks, i.e., [no] more than four to five steps of  
instructions, [no] rapid, assembly-line-type work, [no]  
significant responsibility for the safety of others, [and no]  
significant hypervigilance[,]" A.R. 12, appropriately synthesized  
the limitations Dr. Rodriguez found.

1       **D. Plaintiff's Credibility:**

2       Once a claimant has presented objective evidence she suffers from  
 3 an impairment that could cause pain or other nonexertional  
 4 limitations,<sup>11</sup> the ALJ may not discredit the claimant's testimony  
 5 "solely because the degree of pain alleged by the claimant is not  
 6 supported by objective medical evidence." Bunnell v. Sullivan, 947  
 7 F.2d 341, 347 (9th Cir. 1991) (en banc); Moisa v. Barnhart, 367 F.3d  
 8 882, 885 (9th Cir. 2004). Thus, if the ALJ finds the claimant's  
 9 subjective complaints are not credible, he "must provide specific,  
 10 cogent reasons for the disbelief.'" Greger v. Barnhart, 464 F.3d 968,  
 11 972 (9th Cir. 2006) (citations omitted); Orn v. Astrue, 495 F.3d 625,  
 12 635 (9th Cir. 2007). Furthermore, if there is medical evidence  
 13 establishing an objective basis for some degree of pain and related  
 14 symptoms, and no evidence affirmatively suggesting the claimant is  
 15 malingering, the ALJ's reasons for rejecting the claimant's testimony  
 16 must be "clear and convincing." Morgan, 169 F.3d at 599; Carmickle v.  
 17 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1160 (9th Cir. 2008).

18  
 19       The plaintiff contends the ALJ improperly discounted her  
 20 credibility. There is no merit to this claim. Indeed, as the  
 21 Commissioner argues, plaintiff's claim is a red herring. At the  
 22 administrative hearing, plaintiff did not specifically testify about  
 23 any mental limitations she experiences absent her substance abuse, but  
 24 instead stated only that she cannot work due to "mental problems,"

---

25  
 26       <sup>11</sup> "While most cases discuss excess pain testimony rather  
 27 than excess symptom testimony, rules developed to assure proper  
 28 consideration of excess pain apply equally to other medically  
 related symptoms." Swenson v. Sullivan, 876 F.2d 683, 687-88  
 (9th Cir. 1989).

1 which led to a psychiatrist taking her "out of work" in 2006.<sup>12</sup> A.R.  
 2 19. By mental problems, plaintiff explained that she meant her  
 3 "ability to remember things" and "[t]o focus."<sup>13</sup> A.R. 20. The ALJ,  
 4 however, did not reject plaintiff's testimony. To the contrary, in  
 5 finding plaintiff disabled when her substance abuse is considered, the  
 6 ALJ found plaintiff "credible concerning her alleged symptoms and  
 7 limitations because there is no credible evidence she has ever stopped  
 8 using drugs[,] " A.R. 11, and this finding is supported by substantial  
 9 evidence in the record demonstrating plaintiff continues to abuse  
 10 drugs.<sup>14</sup> See, e.g., A.R. 23-24, 38, 122-23, 162, 170, 195. There-  
 11 fore, the ALJ did not improperly discredit plaintiff. Parra, 481 F.3d  
 12 at 750-51.

#### 13 14 **E. Duty To Develop The Record:**

15 "In Social Security cases, the ALJ has a special duty to fully  
 16 and fairly develop the record and to assure that the claimant's  
 17

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18 <sup>12</sup> The plaintiff did cursorily state drugs are not her main  
 19 problem, and she has not been using any more, having last taken  
 20 methamphetamine in September or October of 2007 and marijuana  
 "not too long ago." A.R. 23-24, 38-39.

21 <sup>13</sup> The plaintiff also testified she had blackouts, she is  
 22 anemic, and she has headaches, ringing in her ears, back  
 23 problems, stomach problems, gallbladder problems and ulcers;  
 24 however, she did not state these problems prevent her from  
 working. A.R. 21-22, 41.

25 <sup>14</sup> The ALJ also found that plaintiff's "statements  
 26 concerning the intensity, persistence and limiting effects of  
 [her] symptoms are not credible to the extent they are consistent  
 27 with the [RFC] assessment" because most of plaintiff's symptoms  
 28 are "explainable by her drug abuse[,] " A.R. 13, and, as discussed  
 throughout this opinion, plaintiff's drug abuse is not a basis  
 for finding plaintiff disabled.

1 interests are considered.'" Smolen, 80 F.3d at 1288 (citation  
2 omitted); Widmark, 454 F.3d at 1068. This duty exists regardless of  
3 whether the claimant is represented by counsel, Celaya v. Halter, 332  
4 F.3d 1177, 1183 (9th Cir. 2003); Tonapetyan, 242 F.3d at 1150, and is  
5 "heightened where the claimant may be mentally ill and thus unable to  
6 protect her own interests." Tonapetyan, 242 F.3d at 1150. However,  
7 only "[a]mbiguous evidence, or the ALJ's own finding that the record  
8 is inadequate to allow for proper evaluation of the evidence, triggers  
9 the ALJ's duty to 'conduct an appropriate inquiry.'" Id. (citations  
10 omitted); Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005).

11  
12 Here, the ALJ referred plaintiff for examinations by a  
13 psychiatrist, Dr. Rodriguez, and an orthopedic surgeon, William C.  
14 Boeck, Jr., M.D., A.R. 209-14, and also obtained a medical expert, Dr.  
15 Malancharuvil, who reviewed the medical evidence and listened to  
16 plaintiff's testimony before offering his opinions. A.R. 26-36. Yet,  
17 plaintiff contends the ALJ failed to develop the record because he did  
18 not seek further information from Dr. Bogost. It cannot be said,  
19 however, that there is any ambiguity in the evidence that would  
20 trigger the ALJ's duty to seek more information from Dr. Bogost. In  
21 fact, the ALJ specifically found no need for further inquiry. See  
22 A.R. 13 (Dr. Bogost "has indicated that the [plaintiff's] limitations  
23 are mild in terms of memory and judgment when sober, that she has no  
24 problems in terms of social withdrawal, and that she is simply  
25 apathetic . . . ."). Since the ALJ had not problem interpreting Dr.  
26 Bogost's opinions, Mayes, 276 F.3d at 460, there is no merit to this

1 claim.<sup>15</sup> For all these reasons, substantial evidence supported the  
2 ALJ's determination of plaintiff's RFC.

3  
4 **v**

5 At Step Five, the burden shifts to the Commissioner to show the  
6 claimant can perform other jobs that exist in the national economy.  
7 Hoopai v. Astrue, 499 F.3d 1071, 1074-75 (9th Cir. 2007); Widmark, 454  
8 F.3d at 1069. There are two ways for the Commissioner to meet this  
9 burden: "(1) by the testimony of a vocational expert, or (2) by  
10 reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R.  
11 pt. 404, subpt. P, app. 2."<sup>16</sup> Tackett v. Apfel, 180 F.3d 1094, 1099  
12 (9th Cir. 1999); Widmark, 454 F.3d at 1069. The Commissioner "must  
13 'identify specific jobs existing in substantial numbers in the  
14 national economy that [the] claimant can perform despite her  
15 identified limitations.'" Meanel v. Apfel, 172 F.3d 1111, 1114 (9th

16  
17 <sup>15</sup> The plaintiff also claims the ALJ should have left the  
18 record open to allow her to supplement the record. Jt. Stip. at  
19 20:11-12. Yet, plaintiff was represented at the administrative  
20 hearing by counsel who did not request the record be left open  
21 for supplementation. See A.R. 42-43. Moreover, plaintiff does  
22 not assert she attempted to reopen the hearing, 20 C.F.R. §§  
23 404.944, 416.1444, or supplement the record after the hearing,  
24 and there is nothing in the record itself to suggest that she  
25 could not have done so.

26 <sup>16</sup> The Grids are guidelines setting forth "the types and  
27 number of jobs that exist in the national economy for different  
28 kinds of claimants. Each rule defines a vocational profile and  
determines whether sufficient work exists in the national  
economy. These rules represent the [Commissioner's]  
determination, arrived at by taking administrative notice of  
relevant information, that a given number of unskilled jobs exist  
in the national economy that can be performed by persons with  
each level of residual functional capacity." Chavez v. Dep't of  
Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996)  
(citations omitted).

1 Cir. 1999) (quoting Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir.  
2 1995)).

3  
4 Here, a vocational expert, Alan L. Ey, testified at the  
5 administrative hearing. See A.R. 41-43. Hypothetical questions to a  
6 vocational expert must consider all of the claimant's limitations,  
7 Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001), and "[t]he ALJ's  
8 depiction of the claimant's disability must be accurate, detailed, and  
9 supported by the medical record." Tackett, 180 F.3d at 1101. The  
10 plaintiff contends the hypothetical question to the vocational expert  
11 "fails to set out all of the plaintiff's particular limitations and  
12 restrictions" as identified by Drs. Bogost and Rodriguez. Jt. Stip.  
13 at 22:26-23:05. There is no merit to this claim.

14  
15 The ALJ asked vocational expert Mr. Ey the following hypothetical  
16 question:

17  
18 Let's suppose, Mr. [Ey], someone has a high school level  
19 education, not illiterate, limited to where they can only do  
20 simple tasks at work involving up to four or five-step  
21 instruction but no more than that, and no requirements for  
22 excessive speed in their physical activities like you'd have  
23 at a rapid assembly line, no responsibility for safety  
24 operations, no requirements for hypervigilance, no work  
25 around hazardous machinery and she'd be limited to light  
26 range of work. . . .

27 \* \* \*

28 Are there any unskilled jobs that could [be] performed?

1 A.R. 41-42. In response, the vocational expert identified the jobs of  
 2 //  
 3 housekeeper (Dictionary of Occupational Titles ("DOT")<sup>17</sup> no. 323.687-  
 4 014), with 21,000 job positions regionally and 302,000 nationally, and  
 5 mail clerk (DOT no. 209.687-026), with 4,000 job positions regionally  
 6 and 79,000 nationally. A.R. 42.

7  
 8 Since this hypothetical question reflects the limitations found  
 9 by Dr. Rodriguez and the ALJ's RFC determination of limited light  
 10 work, which this Court has found was proper, the vocational expert's  
 11 testimony constitutes substantial evidence to support the ALJ's Step  
 12 Five determination that plaintiff can perform other work in the  
 13 national economy and is not disabled. Stubbs-Danielson v. Astrue, 539  
 14 F.3d 1169, 1175-76 (9th Cir. 2008).

15  
 16 **ORDER**

17 IT IS ORDERED that: (1) plaintiff's request for relief is denied;  
 18 and (2) the Commissioner's decision is affirmed, and Judgment shall be  
 19 entered in favor of defendant.

20  
 21 DATE: November 23, 2009

/S/ ROSALYN M. CHAPMAN  
 ROSALYN M. CHAPMAN  
 UNITED STATES MAGISTRATE JUDGE

22  
 23  
 24  
 25  
 26 <sup>17</sup> The DOT is the Commissioner's primary source of reliable  
 27 vocational information. Johnson, 60 F.3d at 1434 n.6.